

CHAPTER 8

SEARCH AND SEIZURE

Introduction

The fourth amendment protects individuals from "unreasonable" searches and seizures, and requires that searches and seizures be based upon probable cause and a warrant.

The fourth amendment applies to soldiers - they do not waive their fourth amendment rights when they join the Army. However, the fourth amendment applies to soldiers differently than it does to civilians. This is because a soldier's privacy rights are balanced against not only law enforcement needs but also against military necessity and national security. Consequently, a search may be considered reasonable in a military setting, but would not be so in the civilian world.

An example of how the fourth amendment applies to soldiers differently than it does to civilians is search authorizations. A civilian search "warrant" must be in writing, under oath, and issued by a civilian magistrate. A military search "authorization," on the other hand, need not be in writing, need not be under oath, and may be issued by a commander. Despite these technical distinctions, the terms "search warrant" and "search authorization" basically mean the same thing and are often used interchangeably.

Another example of how the fourth amendment applies to soldiers differently than to civilians is urinalysis testing. Most civilians presently are not subject to random urinalysis testing for illegal drug use. Soldiers, however, must give urine samples during routine health and welfare inspections. This greater intrusion into a soldier's privacy is justified because of the detrimental impact that illegal drug use has on military operations and national security.

Searches and seizures need not always be based on probable cause and a search warrant or authorization. There are several situations where the fourth amendment does not apply, such as searches of government property or seizures of items in plain view. There are also situations where the fourth amendment applies but no probable cause or warrant is required. For example administrative inspections, such as health and welfare inspections, urinalysis inspections, gate inspections, and inventories, need not be based on probable cause or a warrant.

The search and seizure rules are complex and constantly changing because of court interpretations. Therefore, the best advice is to contact your legal adviser whenever a search and seizure issue comes up. Your legal adviser can assist you with proposed courses of action, and recommend alternatives which will decrease the likelihood that evidence may be found inadmissible at a court-martial.

A. Warrants and Probable Cause.

1. Probable Cause.

a. **Probable Cause Defined.** There is probable cause to search when there are reasonable grounds to believe that items connected with criminal activity are located in the place or on the person to be searched.

b. **Evaluating Probable Cause.** A commander may determine that probable cause exists based on his or her personal observations, or information from others. The commander's task is to determine from the totality of the circumstances whether it is reasonable to conclude that evidence of a crime is in the place to be searched. In determining whether probable cause exists, the following method for evaluating the information should be used.

(1) **Factual Basis.** The commander should be satisfied that the information was obtained in a reliable manner. The informant should have actually seen, or heard the information being reported. This may be satisfied in any of the following ways:

(a) **Personal observation.** The trustworthiness of information can be established if the informant personally observed the criminal activities. In drug cases, you should also inquire why the informant believes that what he or she saw was drugs. You should determine whether the informant had a class on drug identification, furnished reliable information in the past, or had substantial experience with drugs.

(b) **Admission of the suspect.** An informant's information is considered reliable if based on statements he or she heard the suspect or an accomplice make.

(c) **Self-verifying detail.** The factual basis of an anonymous tip may be established if the tip is so detailed that the information must have been obtained as a result of a personal observation.

(2) **Believability.** The commander should also be satisfied as to the credibility of the person furnishing the information. This may be established by one or more of the following:

(a) **Demeanor.** When the information is personally given to the commander, the commander can judge the informant's believability at that time. In many cases the individual may be a member of the commander's unit and the commander is in the best position to judge the credibility of the person. Even when the person is not a member of the commander's unit, the commander can personally question the individual and determine the consistency of statements made by the individual.

(b) **Past reliability.** This is one of the easiest methods for establishing believability: knowledge that the informant has proven reliable in the past. A commander should examine the underlying circumstances of past reliability, such as a record that the informant has furnished correct information in the past.

(c) Corroboration. Corroboration means that other facts back up the information provided. Corroboration and the demeanor of the person are particularly important when questioning first-time informants with no established record of past reliability.

(d) Declaration against interest. The person furnishing the information may provide information that is against that person's penal interest. For example, when a person knowingly admits to an offense and has not been promised any benefit, he or she may be prosecuted for that offense. This lends a great degree of reliability to the information furnished.

(e) Good citizen informants. Often, the informant's background renders him or her credible. For instance, a victim or a bystander with no reason to lie may be considered reliable. In addition, law enforcement officers and good soldiers are generally considered reliable sources of information.

2. Search Warrants and Authorizations.

a. Commander's Authorization. A commander may authorize searches of his or her soldiers and equipment, or areas he or she controls, when there is probable cause to believe that items connected with criminal activity are located in the place or on the person to be searched. When time permits, the commander should consult a legal adviser first. A commander may not delegate the authority to authorize searches to others in the unit. The power to authorize a search, however, may devolve to an acting commander if the commander is absent.

b. Magistrate's and Judge's Authorization. Ordinarily, when there is a magistrate (designated JAG officer) or a judge on the installation, law enforcement or unit personnel should get the magistrate's or judge's authorization to search. Using a magistrate to authorize a search may be preferable to requesting authorization from a commander for several reasons. First, commanders may be involved in an investigation related to a search and their neutrality could become an issue. Second, the magistrate may authorize searches anywhere on an installation; therefore, issues of scope of authority are avoided. Third, if a search authorization is contested at trial, the commander need not appear to testify.

c. Procedures for Obtaining an Authorization to Search. AR 27-10, Military Justice (6 September 2002), sets out the procedures for obtaining an authorization to search. Written or oral statements (including those obtained by telephone or radio), sworn or unsworn, should be presented to the commander, magistrate, or military judge. The authorizing official will then decide whether probable cause to search exists, based upon the statements and will issue either a written or an oral authorization to search. Written statements and authorizations are preferred to avoid problems later if the search is challenged at trial. When granting authority to search, the authorizing official must specify the place to be searched and the things to be seized. Sample forms for obtaining an authorization to search are in the back of AR 27-10.

d. Scope of an Authorized Search. Once authorization to search has been

obtained, the person conducting the search must carefully comply with the limitations imposed by the authorization. Only those locations which are described in the authorization may be searched and the search may be conducted only in areas where it is likely that the object of the search will be found. For example, if an investigator has authority to search the quarters of a suspect, the investigator may not search a car parked on the road outside. Likewise, if an authorization states that an investigator is looking for a 25-inch television, the investigator may not look into areas unlikely to contain a TV, such as a medicine cabinet or file cabinet.

e. **Detention Pending Execution of Search Authorizations.** An authorization to search for contraband implicitly carries the limited authority to detain occupants of a home, apartment, or barracks room while the search is conducted. Police may also detain occupants leaving the premises at the time police arrive to execute the search authorization.

3. Commander Must Be Neutral and Detached.

a. A commander, much like a judge, must remain objective when deciding whether there is sufficient information to justify a search authorization. When a commander is actively involved in a criminal investigation, he or she is disqualified from acting as the authorizing official.

b. A commander is not neutral and detached if he or she initiated or orchestrated the investigation or conducted the search personally. On the other hand, knowledge of an on-going investigation within the unit, disdain for certain kinds of crime, and personal information or knowledge about a suspect's character do not disqualify a commander from granting a search authorization.

c. If a commander is unsure whether a court will view his or her involvement in a particular case as disqualifying, the commander should play it safe by sending the person seeking the authorization to the military magistrate or to the next higher commander who has no involvement with the case.

B. Exceptions to the Fourth Amendment.

1. Nongovernmental Searches. The fourth amendment only protects soldiers against searches by U.S. government officials. It does not cover searches by private persons or foreign officials.

a. **Private Searches.** The fourth amendment does not prohibit searches by private persons (roommates or family members), unless the private search was directed by a commander or police investigator. Be careful when working with unit informants. Telling them to "keep your eyes open" is permissible; telling them to bring you evidence may violate the fourth amendment and render the evidence inadmissible.

b. **Foreign Searches.** The fourth amendment applies only to the U.S. Government. Searches by German or Korean police need not comply with the fourth

amendment unless the foreign search is directed, conducted, or participated in by U.S. agents. Foreign police may freely exchange criminal information with the military police.

2. No Reasonable Expectation of Privacy. The fourth amendment does not apply unless the suspect has a reasonable expectation of privacy in the area searched.

a. Government Property. A soldier has no reasonable expectation of privacy in most government property, including military vehicles, tents, common tool kits, and office desks. No authorization is required to search these places. But the fourth amendment does cover items issued for personal use, such as wall lockers, foot lockers, and field gear. These items may be examined only during inspections and authorized searches.

b. Abandoned Property. There is generally no expectation of privacy in abandoned property, such as a car abandoned on a public road, on-post quarters after a person has checked out, items thrown from a window or to the ground, garbage containers placed on a street curb, or a building destroyed by fire. Therefore, no authorization or probable cause is required to search or seize these items.

c. Open View. What a person knowingly exposes to the public is not subject to fourth amendment protection. For example, a tattoo, a gold tooth, or the exterior of a car parked on a public street are not protected by the fourth amendment.

d. Sensory Aids. So long as a person is lawfully present in an area, he or she may properly use low-technology devices that enhance the senses. For example, flashlights may be used to look inside cars and dogs may sniff autos, luggage, or field gear. On the other hand, a thermal imaging device may not be used to observe activity inside a private home. In addition, special rules exist for the use of wiretaps and electronic "bugs." See your trial counsel if you feel electronic surveillance is necessary.

3. Exigent Circumstances. In emergencies, where the delay necessary to get a warrant would result in the removal, destruction, or concealment of evidence, a warrant is not required. However, probable cause is still required in these situations. For example, a staff duty officer walking through a barracks who smells marijuana coming from a soldier's room may enter the room and "freeze" the situation. If he apprehends the soldier for using marijuana, he may conduct a search of the soldier incident to apprehension and may also seize any items in plain view. He should then seek authorization before he searches the rest of the room.

4. Automobile Exception. If there is probable cause to search an automobile, a warrant or authorization is generally not required. For example, if a staff duty officer has probable cause to believe that drugs are located in a soldier's car, he may search the car without obtaining a warrant or search authorization. This exception exists because such evidence may be easily lost if the automobile is driven away before a warrant or authorization is obtained. The entire automobile may be searched, to include the trunk.

5. Consent Searches. A soldier may consent to a search. However, the consent must be voluntary and not coerced by the influence of rank or position. When requesting

consent you should advise the soldier that he or she has the right not to consent. If the soldier does consent, he or she can withdraw the consent at any time. In this case, the search must stop immediately. A soldier may consent to a partial search (for example, everything but the wall locker). Article 31 rights and written consent are recommended but not required. Do not "threaten" a soldier that the search will be conducted even if he or she refuses to give consent.

6. Search Incident to Apprehension. Any person who has been properly apprehended may be searched in order to ensure the safety of the apprehending person and others, and to prevent destruction of evidence. Only the person's clothing and body and any areas within the person's reach may be searched. When a person is apprehended in an automobile, the entire passenger compartment may be searched. This includes the glove box, console, back seat and under the seats, but does not include the trunk.

7. Inspections.

a. General. Inspections are a function of command. The commander has the inherent right to inspect the barracks to ensure the command is properly equipped, maintained, and ready, and that personnel are present and fit for duty. A commander conducting an inspection may find items that could aid in a criminal prosecution. These items may be seized and used as evidence for an Article 15 or court-martial.

(1) Primary purpose test. An inspection must have a primary administrative purpose. For example, inspections to ensure security, readiness, cleanliness, order, and discipline are permissible. Inspections may include an examination to locate and confiscate unlawful weapons and other contraband, since confiscation of contraband is a means of ensuring security, readiness, and order. An inspection whose primary purpose is to obtain evidence for an Article 15 or court-martial is not permissible, and any evidence discovered will be inadmissible. An inspection may have a dual purpose (both administrative and criminal) so long as the primary purpose is administrative.

(2) Scope. The scope of an inspection must reflect its purpose. If the purpose is broad (general security, readiness, fitness for duty) then the intrusion may be broad (unroll sleeping bags, check inside pockets, unlock containers). If the purpose of the inspection is narrow (for example, only to check helmet accountability), then one cannot inspect beyond that purpose.

(3) Subterfuge rule. An inspection may not be used as a subterfuge for a search. This normally takes place when a commander "feels" an individual has contraband in his possession or living area but lacks sufficient information to amount to probable cause, and uses an "inspection" to search that person for the contraband. Evidence discovered during an improper inspection usually is not admissible for court-martial or Article 15 purposes. If (1) an inspection immediately follows a report of a specific offense and was not previously scheduled, or (2) specific persons are targeted, or (3) persons are subjected to substantially different intrusions, then the government must show by clear and convincing evidence that the primary purpose of the examination was administrative, and that the inspection was not a ruse for an illegal criminal search. The commander's testimony is crucial to this issue.

b. Health and Welfare Inspections. The most common type of inspection is an commander's inspection of the unit to protect the health and welfare of the unit's soldiers.

1) The primary purpose of such an inspection must be administrative. Commanders should ensure that the scope of the inspection is consistent with the purpose and that everyone is treated alike. For example, if one soldier's wall locker is inspected with "extra care" during a health and welfare inspection, the inspection will likely be found to be an unlawful subterfuge for a criminal search.

(2) Drug Dogs. A commander conducting a health and welfare inspection may use a drug detector dog to enhance the senses of individuals conducting the inspection. Drug detector dogs may be used to inspect barracks, automobiles, and other areas, but as a matter of DA policy, will not be used to inspect persons. Drug dogs may not sniff individual soldiers or formations. When a request is made for a handler and dog to go to a particular unit, the commander requesting the team should ask the provost marshal about the reliability of the dog and handler. Before the dog is used, the handler should demonstrate the reliability of the dog. The test for reliability consists of certification from an approved training course, the training and utilization alert record, and performance demonstrated to the commander.

c. Lost Weapons Lock-downs. The commander has the right to conduct an inspection for weapons or ammunition after a unit has been firing or has found a weapon missing. The commander or designated representatives may inspect all persons who were on the range and others who were in a position to steal the weapon, and their barracks and private automobiles.

d. Gate Inspections. A gate inspection is another form of an administrative inspection. An installation commander may authorize gate inspections to check drivers' licenses and vehicle registrations, deter drug traffic, reduce DWI incidents, prevent terrorist attacks, deter larcenies, or any other legitimate administrative purposes. Inspections may include all vehicles, or only those designated by the commander, such as every tenth vehicle.

(1) Written guidance. The installation commander must issue written instructions defining the purpose (e.g. security, drugs, or and DWIs), times, locations, and methods for gate inspections. It is important to limit the discretion of the gate guards conducting the inspection. Some discretion to consider traffic patterns is permissible so long as it is provided by the written guidance.

(2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure from the installation. A warning sign or visitor's pass are common ways to give notice.

(3) Drug dogs. Metal detectors, drug dogs, and other technological aids may be used during gate inspections.

(4) Civilian employees. Civilian employees may be entitled to overtime pay when their working conditions are affected by gate inspection delays. Check the local collective bargaining agreement to gauge this impact.

(5) Entry inspections. Civilians entering the installation may only be inspected with their consent. If they refuse to consent, they should be denied access to the installation. Soldiers may be ordered to comply with an inspection, and may be inspected over their objection, using reasonable force, if necessary.

(6) Exit inspections. Civilians exiting the installation may be inspected over their objection, using reasonable force if necessary. Civilians who refuse to comply with an exit inspection should be informed of possible administrative sanctions (loss of post driving privileges, bar letter). Immediately notify the installation commander if this happens. If contraband is found, detain the civilians and notify the local civilian police. The standard for exit inspections for soldiers is the same as for entry inspections; they may be ordered to submit to an inspection and reasonable force may be used if necessary.

e. Inventories.

(1) General. A commander is required to conduct an inventory of a soldier's property when the soldier is AWOL, admitted to the hospital, or on emergency leave. See AR 700-84, Issue and Sale of Personal Clothing (28 February 1994). The commander or a designated representative should also inventory the property of an individual who has been placed in military or civilian confinement. See AR 190-47, The U.S. Army Correctional System (15 August 1996). If the person conducting the inventory discovers items that would aid in a criminal prosecution, those items may be seized and used as evidence.

(2) Automobiles. Under some circumstances, automobiles may also be inventoried. When a person is arrested for DWI or for some other offense which requires transportation to the MP station, the person's vehicle may be secured. If the vehicle is impounded, it may be inventoried. If a person is arrested for DWI just as he pulls into his quarters' parking lot, there is no reason to impound the vehicle. But if the person is arrested on an outer road of the post where there is a possibility of vandalism, the vehicle may be impounded and inventoried.

C. Apprehensions

1. Contacts and Stops and Apprehensions.

a. Contacts. Officers, NCOs, and MPs may initiate "contact" with persons in any place they are lawfully situated. Generally, such contacts are not "apprehensions" subject to the fourth amendment. Most contacts do not result from suspicion of criminal activity. Examples of lawful contacts include questioning witnesses to crimes and warning pedestrians that they are entering a dangerous neighborhood. These types of contacts are entirely reasonable, permissible, and within the normal activities of law enforcement personnel and commanders. They are not detentions in any sense.

b. **Stops.** An officer, NCO, or MP who reasonably suspects that a person has committed, is committing, or is about to commit a crime has the obligation to stop that person. Both pedestrians and occupants of vehicles may be stopped. If the person is a suspect and is to be questioned, Article 31 warnings should be read. The stop must be based on more than a hunch. The official making the stop should be able to state specific facts to support the decision to stop an individual.

c. **Apprehensions.** Arrests in the military are called apprehensions. Any officer, noncommissioned officer, or military policeman may apprehend individuals when there is probable cause to apprehend. Generally, a person is apprehended when he or she is not free to leave. The person making the apprehension should identify himself or herself and tell the suspect he or she is under apprehension. The suspect should also be told the reason for the apprehension and read his or her Article 31 rights, preferably from a rights warning card, as soon as practicable. If the suspect resists apprehension he or she may be prosecuted for resisting apprehension or disobeying an order. Civilians may be detained until military or civilian police arrive.

2. **Probable Cause to Apprehend.** A person may be apprehended only if there is probable cause that the person has committed a crime. Probable cause to apprehend is a common sense appraisal based on all of the facts and circumstances present. An example of probable cause to apprehend is when you or some other reliable person has seen an individual commit a violation of the UCMJ, such as using marijuana, assaulting someone, breaking another's property, or being drunk and disorderly.

3. **Arrest Warrants.** Generally, if there is probable cause, no authorization to apprehend (arrest warrant) is required in the military. There is one important exception, however; that is when you apprehend someone in a "private dwelling," such as on-post family quarters, the BOQ or BEQ, or any off-post quarters. If the person to be apprehended is in a "private dwelling," the apprehending officer must obtain authorization to make the apprehension from a military magistrate or the commander with authority over the private dwelling (usually the installation commander). Barracks and field encampments are not considered private dwellings; therefore, no special authorization is needed to apprehend someone there. Also, to apprehend a person at off-post quarters requires coordination with civilian authorities and may require a search warrant from a civilian judge.

D. Urine Tests

1. Use of Test Results.

a. There are four kinds of urine tests: inspections, probable cause tests, consent tests, and fitness-for-duty tests. Results from inspection, probable cause, and consent urine tests may be used for Article 15, court-martial and administrative separation purposes. The results of a fitness-for-duty test may not be used as a basis for an Article 15 or court-martial. In addition, a positive fitness-for-duty test result may not be used in an administrative separation action unless the soldier receives an honorable discharge. See AR 635-200, Personnel Separations, Enlisted Personnel (1 November 2000).

b. Command-directed. Be wary of the term "command-directed" urinalysis. Any urine test ordered by the commander (inspection, probable cause, fitness-for-duty) is "command-directed." The ability to use the test results for UCMJ or separation purposes depends on the type of test (inspection, probable cause, consent), not on whether or not it is labeled "command-directed." A fitness-for duty test is normally "command-directed," but a positive result may not be used for UCMJ purposes.

2. Urinalysis inspections.

a. Unit integrity. A unit urinalysis test is merely another form of inspection. All of the soldiers in a unit may be tested or soldiers may be "randomly" selected, usually based on the final digit of their social security number, for testing. Alternatively, a portion of the unit (platoon, section, squad) may be tested.

b. Unit Alcohol and Drug NCO. When the government loses a urinalysis case it is rarely due to laboratory errors. Army urine testing laboratories are now widely regarded as the models for comparison and employ the most stringent scientific testing equipment and techniques. When the government loses a urine case or decides not to prosecute one, it is primarily due to problems at the unit level, usually with the chain of custody. Many of these problems stem from the Unit Alcohol and Drug NCO. If a commander takes a soldier who cannot perform adequately as a squad leader and makes that soldier the Unit Alcohol and Drug NCO, it is likely that there will be problems.

3. Probable cause urine tests. Probable cause urine tests follow the same rules as other probable cause searches. If, under the totality of the facts and circumstances, a commander has a reasonable belief that a soldier has used drugs, then he may order the soldier to provide a urine sample. The results of that test are admissible. Common examples of probable cause urine tests are (1) when drugs are discovered on a soldier's person, car, wall locker or field gear; and (2) when a soldier has been observed using drugs.

4. Consent urine tests.

a. Consent must be voluntary. A consent urine test is a form of consent search. No probable cause or authorization is required, but the commander must be able to show that the soldier voluntarily consented to provide a urine sample and was not coerced by the rank or position of the person requesting the sample. When a commander asks a soldier to provide a urine sample, he may advise the soldier of his Article 31 rights and ask the soldier to sign a consent form. If the soldier has no questions, then the consent will normally be viewed as voluntary.

b. What to do if the soldier asks questions. If a soldier asks the commander, "What are my options?" a new problem arises. In response to the "what are my options" question, the commander should explain the differences between a consent urine test and one ordered by the commander. The results of a consent urine test may be the basis for an Article 15, court-martial or administrative elimination. The results of a fitness-for-duty urine test may not. If the soldier understands these differences and nevertheless consents, the consent will probably be viewed as voluntary.

c. Consent as a back-up. If a commander has probable cause to order a urine test, he may still request a consent sample as a precautionary alternative. If the soldier asks "what are my options" the commander should explain that the results of a consent urine test are admissible and, if the soldier refuses to consent, the commander may order a urine test. However, the commander should also tell the soldier that if the commander orders the test, the results may not be admissible if it is later determined that the commander did not have probable cause. In this case, the test results may not be used for Article 15 or court-martial purposes and may only be used in an administrative separation if the soldier receives an honorable discharge.

5. Fitness-for-duty urine tests.

a. Results inadmissible. AR 600-85, Army Substance Abuse Program (1 October 2001) provides that a commander may order a urine test to determine the "fitness-for-duty" of any soldier when the commander observes, suspects, or otherwise becomes aware that the soldier may be affected by illegal drug use. The results of such a fitness-for-duty test are inadmissible for Article 15 or court-martial purposes. They are inadmissible because AR 600-85 balances the needs of the military with the individual privacy rights of the soldier and will not allow test results based on mere suspicion to be used for punishment. A commander can order a soldier to provide a urine sample based solely on mere suspicion; but because this is not based upon probable cause, an inspection, or consent, the results may only be used to refer the soldier for rehabilitative treatment or separate him from the service with an honorable discharge. When a commander orders a soldier to provide a urine sample, the commander should understand the admissibility of the urine test so there is no confusion when the test result returns.

b. Suspicion is less than probable cause. Reasonable suspicion sufficient to order a fitness for duty test must be based upon facts which a commander can articulate. However, it need not amount to probable cause.

6. Confirmatory testing. One of the most difficult cases that a commander must handle is when a senior NCO, particularly one who is a "good soldier," tests positive for drug use. The soldier may deny drug use and challenge the validity of the testing procedures at the unit and the lab, often focusing on minor irregularities that do not invalidate the results. A commander has a few options to resolve these dilemmas.

a. Polygraphs. Offer the soldier the opportunity to take a polygraph. A soldier may not be required to take a polygraph, but if he consents to take one, the local CID polygrapher can be invaluable in distinguishing those who did not use drugs from those who only swear that the urine test was wrong. Few of these "wronged" soldiers will be willing to take a polygraph, and many of those who do will admit to the drug use after failing the polygraph test.

b. Blood and DNA testing. When a soldier alleges that his or her urine sample was switched with someone else's, the sample can be tested to ensure that the blood type of the positive sample is the same as the soldier's blood type. This method does not eliminate any possibility of error, but it may help determine whether the positive urine sample

was, in fact, the soldier's sample. DNA found in the urine can also be compared with the soldier's DNA to confirm that the positive sample was submitted by the soldier. Unless there is evidence that the soldier's urine sample was switched, the government is not required to perform blood or DNA testing.

c. Hair testing. If a soldier denies ever using drugs, his or her hair may be tested to confirm this allegation. Since traces of drugs are deposited in a drug user's hair as the hair grows, a hair sample will provide a history of an individual's drug use. Although hair analysis may be unable to detect a single use of drugs, it will be able to detect chronic use. The government is generally not required to pay for hair testing.

CHAPTER 8
SEARCH AND SEIZURE
TEACHING OUTLINE

I. THE FOURTH AMENDMENT

A. Requirements.

1. Searches must be reasonable.
2. Searches must be based on:
 - a) Probable cause.
 - b) Warrant or authorization.

B. Applicability.

1. Fourth amendment applies to soldiers.
2. Fourth amendment provides soldiers less protection than civilians

C. Exclusionary rule: items seized in violation of fourth amendment may not be used in court-martial.

II. WARRANTS AND PROBABLE CAUSE.

A. Search warrants in military are called search authorizations.

1. Search warrants must be in writing, under oath, and issued by a civilian magistrate.
 2. Search authorizations may be oral, need not be under oath, and may be authorized by a military commander.
- B. Warrants/authorizations must be based on probable cause. See Appendix A.
1. What is where and when?
 2. How do you know?
 3. Why should I believe you?
- C. Who can authorize search.
1. Any commander of the place to be searched (“king-of-the-turf”) may authorize search.
 2. Preferable to use the military judge or magistrate: avoids problems and eliminates chance that commander may have to testify.
- D. Commander must be neutral and detached.
1. Cannot be “investigator” and “judge” in same case.
 2. Examples.
 - a) Commander is not neutral and detached when he or she:
 - (1) Orchestrates the investigation.

- (2) Conducts the search.
- b) Commander may be neutral and detached even though he or she:
 - (1) Is present at the search.
 - (2) Has personal knowledge of the suspect's reputation.
 - (3) Makes public comments about crime in his or her command.
 - (4) Is aware of an on-going investigation.
- 3. Alternatives:
 - a) Next higher commander.
 - b) Military magistrate.

III. EXCEPTIONS TO FOURTH AMENDMENT.

- A. Private searches (by roommate, friend, etc.).
- B. Foreign searches.
- C. Government property (unless issued for personal use).
- D. Items in open view.
- E. Exigent circumstances.

F. Consent.

G. Inspections.

1. Primary purpose of inspection must be administrative.

a) Administrative inspection.

(1) Primary purpose is administrative (ensure readiness, eliminate drugs from unit, etc.).

(2) Focus on unit problem.

(3) Must be reasonable (treat all the same).

b) Criminal search.

(1) Primary purpose is to gather evidence of crime.

(2) Usually follows specific crime (rape, larceny, drugs).

(3) Focus on specific person.

(4) Must be based on probable cause and warrant.

2. The subterfuge rule. An inspection is presumed to be an improper criminal search if it:

a) Immediately follows report of a specific offense; or

b) Targets specific soldiers;, or

- c) Subjects soldiers to substantially different intrusions.
- 3. Health and welfare inspections.
 - a) Articulate primary purpose:
 - (1) If primary purpose is administrative (ensure readiness, eliminate crime from unit), inspection is proper
 - (2) If primary purpose is to obtain evidence for an Article 15 or court-martial, inspection is improper.
 - (3) Inspection may have dual purpose so long as primary purpose is administrative.
 - b) Inspect everyone alike; do not target specific soldiers.
- 4. Lost weapon lock-downs.
 - a) Keeping all of the unit members in the unit area to continue to search for a lost weapon is a legitimate military purpose. It makes transfer of the missing item less likely and protects the community.
 - b) Mass punishment is not a proper purpose, although it is often perceived as a side-effect of a lock-down due to the inconveniences to soldiers and families.
- 5. Gate inspections.
 - a) Prepare written instructions for guards.

- b) Post notice at gate.
 - c) Technological aids (mirrors, drug dogs) may be used.
 - d) Consider manpower and morale. Civilian employees delayed at gate may be entitled to overtime.
6. Inventories. Evidence obtained during proper inventory may be used against soldier.

IV. URINE TESTS.

A. Four Kinds of Urine Tests.

- 1. Inspection
- 2. Probable Cause
- 3. Consent
- 4. Fitness for Duty
 - a) Cannot be used for disciplinary actions

B. Drugs tested.

1. Marijuana.
2. Cocaine.
3. Amphetamines, Opiates, Barbiturates, PCP.
4. Some drugs are tested on a rotating basis or upon request (e.g. steroids).

C. Tests used.

1. Initial test: immunoassay test.
2. Confirmation test: gas chromatography/mass spectrometry test.

D. When you question the test results (for example, if a “super soldier” tests positive) you may consider:

1. Polygraph test.
2. Blood or DNA tests.
3. Hair test. Limitations.

E. Defenses.

1. Passive inhalation (marijuana).
2. Spiked food or drink (marijuana and cocaine).

APPENDIX A
COMMANDER'S GUIDE
TO ARTICULATE PROBABLE CAUSE TO SEARCH

1. Probable cause to authorize a search exists if there is a reasonable belief, based on facts, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:

- a. What is where and when? Get the facts!
 - (1) Be specific: how much, size, color, etc.
 - (2) Is it still there (or is information stale)?
 - (a) If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.
 - (b) If the witness saw large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.
- b. How do you know? Which of these apply:
 - (1) "I saw it there." Such personal observation is extremely reliable.
 - (2) "He [the suspect] told me." Such an admission is reliable.
 - (3) "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.
 - (4) "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.
- c. Why should I believe you? Which of these apply:
 - (1) Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

- (2) Witness has given reliable information before; he has a good track record (CID may have records).
 - (3) Witness has no reason to lie.
 - (4) Witness has truthful demeanor.
 - (5) Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")
 - (6) Other information corroborates or verifies details.
 - (7) Witness made admission against own interests.
- 2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.
 - 3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.
 - 4. Make a written note of the reasons why you authorized the search in case authorization becomes an issue later.
 - 5. Talk to your legal advisor!

Appendix B: Cut-Off Levels

Cut-off Levels. DOD and urine testing laboratories have established “cut-off” levels. Samples that give test results below these cut-off levels are reported as negative. A sample is reported as positive only if it gives test results above the cut-off level during both the screening and the confirming test.

3. Cut-off levels for screening tests (IA).

<u>Drug</u>	<u>ng/ml</u>
Marijuana (THC)	50
Cocaine (BZE)	150
Amphetamines	500
Barbiturates	200
Opiates	2000
Phencyclidine (PCP)	25
Lysergic Acid Diethylamide (LSD)	0.5

4. Cut-off levels for GC/MS test:

<u>Drug</u>	<u>ng/ml</u>
Marijuana (THC)	15
Cocaine (BZE)	100
Amphetamine/methamphetamine	500
Barbiturates	200
Opiates	
Morphine	4000
Codeine	2000
6-MAM (heroin)	10
Phencyclidine (PCP)	25
Lysergic Acid Diethylamide (LSD)	0.2

Appendix C: Detection Times

Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below. Source: US Army Drug Oversight Agency & Technical Consultation Center, Syva Company, San Jose, California, telephone: 1-800-227-8994 (Syva).

<u>Drug</u>	<u>Approximate Retention Time</u>
Marijuana (THC)(Half-life 36 hrs)	
Acute dosage (1-2 joints)	2-3 days
Eaten Marijuana	1-5 days
Moderate smoker	
4 times per week):	5 days
Heavy smoker	
(daily):	10 days
Chronic smoker:	14-18 days
(may be 20 days or longer)	
Cocaine (BZE)(Half-life 4 hrs)	2-4 days
Amphetamines	1-2 days
Barbiturates	
Short acting	
(e.g. secobarbital):	1 day
Long acting	
(e.g. phenobarbital):	2-3 weeks
Opiates	2 days
Phencyclidine (PCP):	14 days
Chronic user:	up to 30
Lysergic Acid Diethylamide(LSD)	8-30 hrs-